IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JANG'S LANDSCAPING INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.: U407-09-210
	)	
OCTAVIA C. DRYDEN	)	
KENNETH DRYDEN	)	
	)	
Defendants.	)	
	)	

Submitted: March 31, 2010
Decided: April 20, 2010

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DECISION AFTER TRIAL

Plaintiff Jang's Landscaping, Inc. (hereinafter "Plaintiff" or "Jang's") filed a complaint against Octavia and Kenneth Dryden (hereinafter "Defendants") seeking recovery of money allegedly owed for remodeling/construction work done on a patio at Defendants' home. Defendants deny owing any money and counterclaimed for damages resulting from alleged poor and improper work. Alternatively, the Court is asked to decide whether the Plaintiff failed to properly install the system, thus breaching the contract and causing the Defendants damages. Trial was held on March 18, 2010. The Court reserved decision and the parties were directed to provide their reasoning and

authority as to whether the appropriate New Castle County Code applied to this contract and construction. This is the Court's decision.

FACTS

The record supports these findings of fact. In April 2006, Defendants entered into a contract with Plaintiff for the installation of a hardscape brick patio at their home located at 20 Moonlight Court, Newark, DE 19702. This contract furnishes little detail and contained only a rough sketch of a hardscape patio, with three risers, or steps, descending from the rear exit of the home, and the price of $14,000. In the contract, there are no dimensions, no language specifying that the patio must comply with applicable codes or regulations, no date for completion, and no description of the type of materials to be used.

Pursuant to the contract, Defendants paid a deposit of $6,750. Shortly thereafter, Jang, the owner of Plaintiff, went to Defendants' home with a crew of workers to begin construction. Jang, who drafted the sketch in the contract, outlined the boundaries of the patio with spray-paint, and instructed the workers how to perform the construction. Jang altered the height of the middle riser to nine (9) inches, leaving the other two risers at the height of seven and one half (7 ½) inches. (These dimensions were not in the contract.)

After construction was complete, Plaintiff charged Defendants' credit card $7,250, the remaining balance under the contract. Octavia Dryden was concerned that there was insufficient sand under the patio, and thought some tiles were discolored. She called Jang and requested he personally inspect the patio to alleviate her concerns. It is unclear whether Jang ever personally inspected the patio. Mrs. Dryden acknowledged that construction took place mostly during days when she and her husband were away at

work, so Jang may have personally inspected the patio. Mrs. Dryden placed a stop payment order on the $7,250 credit card payment because she was frustrated that Jang did not inspect the patio. Later, Jang and Mrs. Dryden agreed that on May 4, 2006, Jang would inspect the patio and discuss her concerns. Jang did not attend this meeting as promised.

The Court heard testimony from Plaintiff's expert witness Jeff Campbell (hereinafter "Campbell"). Campbell received training and is certified by E.P. Henry, a manufacturer of hardscape materials, and the International Concrete Pavers Institute. He also has seventeen (17) years of experience installing hardscape patios. Campbell testified that Plaintiff had done a "great job," and the only issues he noted were minor settling of pavers near the downspout and mulch bed. He estimated repair costs at $350-400. On cross examination, Campbell testified that the New Castle County Building Code does not require a permit or inspection before the construction of outdoor hardscape patios. He further testified that the design and height of the patio steps did not create any safety issues, although steps should generally be seven and one half (7 ½) inches in height.

The Court also heard testimony from Defendants' witness Stephen Wentzell (hereinafter "Wentzell"), an employee of New Castle County and a certified Building Plans Examiner with eight (8) years experience. Wentzell testified that New Castle County adopted the International Residential Building Code as the New Castle County Building Code in 2001, and again in 2009. He testified that pursuant to the code, a set of stairs with more than two (2) steps that exit a residential building is required to have a landing, or uppermost step, extending thirty six (36) inches in the direction of travel. He

further testified that pursuant to the code, the maximum height of a riser (step) is eight (8) inches, and that the individual steps in a staircase may not differ in height by more than three-eight ($3/8^{th}$) of an inch. The landing at issue here does not extend thirty six (36) inches, and the three (3) steps in the staircase at issue differ by more than three-eight ($3/8^{th}$) of an inch in height. He did not visit the site and his measurements were based on photographs taken by the Defendants. Wentzell noted that in a sale, a "good home inspector" would notice the short landing and non-uniform stairs, and that this may have an adverse impact on the value of the home. He agreed that a permit was not required for this job.

Wentzell's testimony was supported by Defendants' expert witness Barri White (hereinafter "White"). White has received training and numerous certifications from the International Concrete Pavers Institute since 1996. White inspected the patio in January 2008, and once more the week of trial. White agreed with Wentzell's assessment that the patio did not meet the New Castle County Building Code standards because the landing was too short, and the riser height was not uniform. White sharply criticized the drainage system installed by Plaintiff, identifying it as the cause of some pavers settling. He also noted that the drainage system in place could cause mold problems in the basement of Defendants' home but conceded that he had not inspected the home for mold or that any mold was reported. During cross examination, White claimed that he does not perform repair work because of the risk of tort liability, but that the only option to fix the patio is to completely replace it, at an estimated cost of $15,500. He would not offer a plan to correct any alleged problems because he will not do any repair work, and limits himself

only to building new units, and he could not or would not offer an estimate of the cost to correct any alleged deficiencies in the patio and stairs.

ANALYSIS

In a civil claim for breach of contract, the burden of proof is on the plaintiff to prove a claim by a preponderance of the evidence. *Interim Healthcare, Inc. v. Spherion Corp.*, 844 A.2d 513, 545 (Del. Super. 2005). To state a claim for breach of contract, the plaintiff must establish the following: (1) a contract existed; (2) the defendant breached the contractual obligations; and (3) the breach resulted in damage to the plaintiff. *VLIW Technology, LLC v. Hewlett-Packard Co. STMicroelectronics, Inc.*, 840 A.2d 606, 612 (Del. 2003).

There is no dispute that the parties entered into a binding contract, albeit rudimentary, for the installation of the hardscape brick patio. Thus, the remaining issues before the Court are whether the Defendants committed a breach of said contract and, if so, to what extent the Plaintiff is entitled to damages. Likewise, the Court must determine whether the Defendants have met their burden of establishing the same elements for their counterclaim.

I. Breach of Contract

Plaintiff claims that Defendants breached the contract by failing to pay $7,250, the remaining balance due under the contract. Plaintiff argues that despite installing a product that was not up to code, the Defendants breached the contract when they placed a stop payment on the final payment.

To recover damages for breach of contract Plaintiff must establish that it substantially complied with the provisions of the contract. *A & A Air Services, Inc. v.*

Jane Richardson, 2006 WL 2382433, at *5 (Del. Com. Pl.)(citing *Emmett Hickman Co. v. Emilio Capaldi Developer, Inc.*, 251 A.2d 571 (Del. Super. 1969)). Defendants contend that the measurements of the patio stairs failed to comply with the appropriate New Castle County Building Code. In support of these allegations, Defendants presented evidence in the form of documentation, photographs and expert testimony. Plaintiff's position is that the work was satisfactory, that the New Castle County Building Code did not apply and no permit was needed.

Delaware recognizes an implied builder's warranty of good quality and workmanship. *Coupe v. Resort Repairs, Inc.*, 2009 WL 3288202, at *4 (Del. Com. Pl.) (citing *Sachetta v. Bellevue Four, Inc.*, 1999 WL 463712, at *3 (Del. Super. 1999)(internal citations omitted)). This implied warranty arises by operation of law. *Id.* (citing *Marcucilli v. Boardwalk Builders, Inc.*, 2002 WL 1038818, at *4 (Del. Super. 2002)). "Where a person holds himself out as a competent contractor to perform labor of a certain kind, the law presumes that he possesses the requisite skill to perform such labor in a proper manner, and implies as a part of his contract that the work shall be done in a skillful and workmanlike manner." *Quality Builders, Inc. v. Macknett*, 2007 WL 3231600, at *2 (Del. Com. Pl.)(citing *Bye v. George W. McCaulley & Son Co.*, 76 A. 621, 622 (Del. Super. 1908)).

In determining whether the contractor's work was performed in a workmanlike manner the standard is whether the party "displayed the degree of skill or knowledge normally possessed by members of their profession or trade in good standing in similar communities" in performing the work. *Id.* (citing *Shipman v. Hudson*, 1993 WL 54469, at *3 (Del. Super. 1993)). Therefore, if the work done is such that a reasonable person

would be satisfied by it, the builder is entitled to recover despite the owner's dissatisfaction. *Shipman*, 1993 WL 54469, at *3. In the instant case, it is clear that Plaintiff held itself out to possess the requisite skill to competently install a hardscape patio. As such, the Court finds that Plaintiff's work is covered by the implied warranty of good quality and workmanship.

The Court concludes that Defendants have established by a preponderance of the evidence that Plaintiff's construction of the patio and steps was not, to a limited extent, of good quality and not performed in a workmanlike manner. The Court finds that a permit was not required for this job, but Plaintiff failed to prove by a preponderance of the evidence that it installed the patio steps consistent with the applicable New Castle County Building Code. After considering the testimony and written submissions, the Court concludes that Plaintiff was contractually obligated to comply with the New Castle County Building Code and failed to do so. In *Koval v. Peoples*, the Superior Court held that, "compliance with applicable laws and regulations is a requirement and condition of building contracts for work to be performed in this State unless the contract expressly provides for a different measure of performance." 431 A.2d 1284, 1286 (Del. Super. 1981). In the absence of any contract language indicating otherwise, the parties are contractually obligated to comply with the requirements of the law. *Coupe v. Resort Repairs, Inc.*, 2009 WL 3288202, at *3 (Del. Com. Pl.)(citing *Bougourd v. Village Garden Homes, Inc.*, 2002 WL 32072790, at *2 (Del. Com. Pl.)).

In this case, the top step does not extend thirty six (36) inches, and the three (3) steps in the staircase differ by more than three-eight ($3/8^{th}$) of an inch in height. The Court credits Wentzell's testimony that the Code provisions applied to this case because

the project included a means of egress via an exterior door. Accordingly, Plaintiff was obligated to comply with the International Residential Code as adopted by New Castle County. Wentzell confirmed that pursuant to the New Castle County Code, the landing in question was required to be at least thirty six (36) inches wide and the risers (steps) were required to be seven and three-fourth (7 ¾) inches in height and could not differ by more than three-eight (3/8th)of an inch in height. Plaintiff's performance would not be satisfactory to a reasonable person because Plaintiff failed to comply with the requirements set forth by New Castle County. Furthermore, Defendants were willing to discuss their grievances, and Plaintiff failed to meet with them to discuss their concerns. The Plaintiff's disregard of the requests to meet and discuss Defendants' concerns would not be satisfactory to a reasonable person.

The Court finds that Plaintiff's construction of the patio was good in large measure (as evidenced by Defendants' photographic exhibits) but failed to an extent (the design of the steps and settling of some pavers or tiles) to meet the good quality and workmanlike result which a reasonable person would expect. Thus, to this extent Plaintiff breached the contract.

II. Defendants' Counterclaim

Since the Plaintiff did not meet its obligation in full, the Defendants did establish their right to some relief under their counterclaim. However, since the Defendants failed to pay or offer to pay some part of the balance due for the good portion of work done, they also defaulted under the contract.

III. Damages

Having determined that both Plaintiff and the Defendants are entitled to some relief, the Court must next decide how to calculate those damages to satisfy this relief. The standard remedy for breach of contract is based upon the reasonable expectations of the parties. *Duncan v. Thera Tx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001); see also *Gebecor Int'l., Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000). Expectation damages are measured by the amount that would place the non-breaching party in the same position as if the breaching party had performed the contract. *Id.*

After reviewing this record the Court finds and concludes that the credible evidence as to relief for the settling of pavers or tiles was presented by Plaintiff's expert, Campbell. Thus, the Defendants are entitled to $400 as damages to correct the settling problems.

A visual appraisal of the steps does not show any apparent defect or problem. (See photographs in evidence.) It must be noted that the Defendants never raised the issue that the steps did not meet the New Castle County Code provisions until the case was set for trial. The issue was never pled in the Defendants' answer. Their expert, Wentzell, allowed that this probably would not be an issue except for a "good home inspector." Defendants had no distinct data to show the cost of correcting this problem. But a problem has been shown (even though the depth or the extent is not clearly shown), and the injured party should be recompensed in some measure. (See an analysis of damages in this type of case in *Leary v. Oswald*, 2006 WL 3587249 (Del. Super. 2006).

The draconian suggestion from Defendants' expert (White) that the only way any problems with this patio can be corrected is by tearing out all the construction and rebuilding anew cannot be squared with the testimony from Plaintiff's expert (Campbell)

and Defendants' expert (Wentzell). A less radical result is dictated. The need to amplify the record on this issue does not appear necessary.

The Court concludes that a fair recompense to Defendants for the steps problem is $750.

For the foregoing reasons and conclusions, judgment is entered in favor of the Plaintiff in the amount of $6100 (balance due of $7250, less offsets of $400 and $750). No pre-judgment interest will be granted. Post-judgment interest at the legal rate will be allowed. Costs (other than any demand for expert fees which would not be appropriate in this case) shall be divided equally between the parties.

IT IS SO ORDERED

Alfred Fraczkowski
Associate Judge[1]

[1] Sitting by appointment pursuant to Del. Const., Art. IV, §38 and 29 Del. C. §5610.